UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-60257-CIV-DIMITROULEAS

BRENNAN ISLER, KAIDEN ISLER, MELISSA FORRESTER, and VAN ISLER

Plaintiff,

vs.

LAURA ADELUSOLA and CHILDNET, INC.

Defendants,
_____/

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss the Complaint [DE-10]. The Court has carefully considered the Motion, Plaintiffs' Response [DE-19], Defendants' Reply [DE-22], the parties' Responses [DE-33; DE-34] to this Court's Order of July 25, 2008 requiring briefing on subject-matter jurisdiction [DE-30], and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiffs Melissa Forrester (Melissa) and Van Isler (Van) brought this action individually, and on behalf of their minor children, Plaintiffs Brennan (Brennan) and Kaiden (Kaiden) Isler, against Defendants, Laura Adelusola (Adelusola) and ChildNet Inc. (ChildNet). All of the Plaintiffs are residents of the State of Michigan. Defendant Adelusola was employed by Defendant ChildNet, a Florida non-profit corporation with its principle place of business in Broward County, Florida.

Plaintiff Brennan, younger brother to Kaiden, was born premature at thirty-four weeks on

April 22, 2001. Following Brennan's birth, he spent an extended period of time in the hospital and required extensive in-home nursing after his discharge. On July 18, 2001, he was diagnosed with obstructive apnea during a sleep study administered by Dr. Mark A. Epstein. On March 7, 2002, Brennan, then almost one-year old, was diagnosed with obstructive sleep apnea syndrome by Dr. Epstein after another sleep study. Dr. Epstein's study showed the obstructive sleep apnea syndrome had worsened since the previous study.

On November 26, 2002, an allegedly false report was called into a child abuse hotline claiming that Melissa had subjected Brennan to child abuse. On December 27, 2002, the family was asked to submit to interviews at the City of Hollywood Police Department. Detectives from the Hollywood Police Department informed Plaintiffs Melissa and Van that in order for them to take their children home they had to consent to voluntary protective services. Allegedly under duress, Melissa and Van voluntarily agreed to protective services and took their children home.

Dr. John Wright, of the Broward County Child Protection Team, performed a medical consultation of the case and concluded, allegedly in error, that Munchausen Syndrome by Proxy or Child Abuse by Pediatric Condition Falsification was "strongly suspected." Melissa was specifically suspected of falsely reporting that Brennan was experiencing sleep apnea events and tampering with the monitoring equipment that recorded the apnea, therefore subjecting Plaintiff Brennan to unnecessary medical procedures and hospitalizations. Dr. Wright suggested one week of video surveillance of Brennan's alleged apnea events to confirm or dispel whether this was a case of Munchausen Syndrome by Proxy. However, this video surveillance was never installed as the Hollywood Police Department refused to provide the services.

On February 6, 2003, a Verified Petition for Dependency was filed, alleging neglect by

Melissa and Van. Some time around March 4, 2003, a Dependency Mediation Settlement Agreement was entered into, whereby charges against Van were dismissed and Melissa agreed to undergo parental counseling and a psychological evaluation, as well as complete any follow-up recommendations. On March 24, 2003, a Dependency Proceedings Order of Disposition was entered, placing Kaiden and Brennan in the temporary legal and physical custody of their parents while under the protective supervision of the Florida Department of Children and Families (DCF). In April of 2003, ChildNet began to assume the responsibility from DCF for intake and placement services, foster home management, and child welfare management in Broward County, Florida. By April 2004, all of the cases from the DCF, including Plaintiffs' case, were transferred over to ChildNet.

In the meantime, Dr. Epstein administered Brennan's third sleep study on June 13, 2003, and diagnosed him with mild obstructive sleep apnea syndrome, similar to the results of the first sleep study. On August 13, 2003, Dr. Sabine V. Hesse reviewed Dr. Epstein's June 13th sleep study of Brennan and concluded that he suffered from adeno-tonsillar hypertrophy and chronic open mouth breathing. Dr. Hesse recommended a tonsillectomy and adenoidectomy. However, Melissa claims she was hesitant to consent to the operation for fear that any surgical procedure would bolster the claim of Munchausen Syndrome by Proxy against her. After a second visit to Dr. Hesse, they agreed that Melissa and Van should seek a second opinion, but Dr. Hesse threatened to report the Plaintiffs for child abuse if they did not consent to the surgery. Melissa and Van then consented to the tonsillectomy and adenoidectomy after receiving a second opinion verifying Dr. Hesse's diagnosis and treatment plan. Dr. Hesse's post-operative findings confirmed his diagnosis of adeno-tonsillar hypertrophy and he concluded that Brennan should

undergo another sleep study to make sure the symptoms had resolved. On February 3, 2004, at almost three years old, Brennan was administered his fourth sleep study by Dr. Epstein, which found that he still suffered from sleep apnea syndrome.

On February 24, 2004, Judge John B. Bowman, of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, entered an Order on Continued Permanency Hearing, Judicial Review, and Case Plan Review ("Order"). The Order indicated that a hearing was held that day, at which Melissa, her attorney, the Guardian Ad Litem, the Assistant Attorney General, a Ms. Duncan, and Defendant Adelusola were present. The Order states that Melissa did "not substantially compl[y] with the case plan."[1] The Order goes on to instruct that the Department "is hereby ordered to contact the State Attorney's Office to relay the information on this case so that any appropriate action may be commenced [and the Department] shall restaff[2] this case and is hereby authorized to take such action to protect the minor children, including, but not limited to removal."[3] The Court would note that no transcript of the February 24, 2004 hearing was filed with the pleadings, Ms. Duncan is not identified, and it is not clear if a representative from DCF was present. When the Order refers to the "Dept" it is not known at this time if this refers to DCF or ChildNet. Due to the transition from DCF to ChildNet, it remains to be developed in the record what portion of the case each entity handled.

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[1]This was a checked box on a standardized form.

[2]Plaintiffs contend, and Defendants have not refuted, that in dependency proceedings in Broward County, "staffing" refers to a meeting, involving the assigned case worker, a supervisor, the guardian ad litem, and possibly other providers, as well as the parents and/or their attorneys. Following the meeting, a report is made to the court. A "restaffing" may be ordered due to a change of circumstances or when the court is not satisfied with the previous report and recommendations.

[3]This portion of the Order was handwritten, in contrast to the rest of the Order.

Subsequently, Defendant Adelusola filed an Affidavit and Petition for Placement in Shelter ("Affidavit"), dated February 26, 2004. In the Affidavit, Defendant Adelusola alleges that Melissa subjected Brennan to unnecessary medical tests and treatments for medical conditions not confirmed by physicians. Plaintiffs contend the Affidavit contains false statements and material omissions, which caused Kaiden and Brennan to be removed from their parents. On February 27, 2004, Broward County Circuit Judge George Brescher conducted a shelter hearing and found no probable cause for the removal. Plaintiffs Brennan and Kaiden were then returned to their parents' custody. In an Order Terminating Protective Supervision and Jurisdiction, dated February 25, 2004, *nunc pro tunc* August 19, 2004, Judge Bowman terminated Defendant ChildNet's supervision of Brennan and Kaiden and the court's jurisdiction.

On February 25, 2008, Plaintiffs brought this action challenging the actions of Defendants Adelusola and ChildNet. The Complaint alleges claims for the following: Count I - Plaintiff Brennan's Constitutional Claim against Defendant Adelusola under 42 U.S.C. §1983; Count II - Plaintiff Kaiden's Constitutional Claim against Defendant Adelusola under 42 U.S.C. § 1983; Count III - Plaintiff Brennan's False Imprisonment Claim against Defendant ChildNet; Count IV - Plaintiff Kaiden's False Imprisonment Claim against Defendant ChildNet; Count V - Plaintiff Melissa's Intentional Interference with Parent-Child Relationship Claim against Defendant ChildNet (as to Plaintiff Brennan); Count VI - Plaintiff Melissa's Intentional Interference with Parent-Child Relationship Claim against Defendant ChildNet (as to Plaintiff Kaiden); Count VII - Plaintiff Van's Intentional Interference with Parent-Child Relationship Claim against Defendant ChildNet (as to Plaintiff Brennan); and Count VIII - Plaintiff Van's Intentional Interference with Parent-Child Relationship Claim against Defendant ChildNet (as to Plaintiff Kaiden).

II. DISCUSSION

A. Motion to Dismiss Standard

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the allegations of the complaint must be taken as true and must be read to include any theory on which the plaintiff may recover. See Linder v. Portocarrero, 963 F.2d 332, 334-36 (11th Cir. 1992) (citing Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967)). To survive a motion to dismiss, the plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1960 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957)). "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 1969.

B. The Rooker-Feldman Doctrine

As a threshold matter, the Court must determine if jurisdiction exists before proceeding to the issues raised in the Motion to Dismiss. Sinochem Int'l Co. v. Malay Int'l Shipping Corp, 127 S. Ct. 1184, 1191 (2007) ("'Without jurisdiction the court cannot proceed at all in any cause.'") (quoting Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 94 (1998)). "The Rooker-Feldman doctrine places limits on the subject matter jurisdiction of federal district courts and courts of appeal over certain matters related to previous state court litigation." Goodman v. Sipos, 259 F.3d 1327, 1332 (11th Cir. 2001) (citing Rooker v. Fid. Trust Co., 263 U.S. 413, 415-16 (1923); Dist. of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 476-82 (1983)).

> The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts. The doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are 'inextricably intertwined' with a state court judgment. A federal claim is inextricably intertwined with a

> state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.

Siegel v. LePore, 234 F.3d 1163, 1172 (11th Cir. 2000) (internal citations omitted).

Plaintiffs argue that the Rooker-Feldman doctrine does not apply as the February 24, 2004 Order was not a final judgment and they did not have the opportunity to raise their constitutional challenges in the state court dependency proceedings. Plaintiffs also point to the Supreme Court's decision in Exxon Mobil Corporation v. Saudi Basic Industries Corporation, 544 U.S. 280 (2005), in which the Court indicated that the doctrine is limited to circumstances in which a state-court loser brings suit to challenge the state court judgment. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005). Plaintiffs, they point out, were ultimately not state-court losers as Judge Brescher determined that probable cause was lacking and ordered the children to be returned home.

Defendants counter that Plaintiffs are improperly challenging a state-court judgment and are thus precluded by the Rooker-Feldman doctrine from bringing their claims. Defendants argue that in order to adjudicate Plaintiffs' claims, this Court would necessarily have to determine that Judge Bowman's Order of February 24, 2004 was erroneous. Defendants point to the similarities between this case and Goodman v. Sipos, 259 F.3d 1327, 1332 (11th Cir. 2001).

The Court does note the similarities between this case and Goodman: a parent challenges state-court dependency proceedings under 42 U.S.C. § 1983, alleging, among other things, that the case worker falsified information in the affidavit supporting the petition for removal. In Goodman, the Eleventh Circuit held that the Rooker-Feldman doctrine deprived the district court of subject matter jurisdiction as to some of the claims. Goodman, 259 F.3d at 1334-35.

Specifically, for purposes of this case, the allegations that the social worker falsified the affidavit inevitably questioned the validity of the state court's order authorizing removal, as the state court necessarily determined the validity of that affidavit. Id. at 1334.

However, here the Plaintiffs are challenging the Affidavit that was submitted following Judge Bowman's February 24, 2004 Order. Defendants argue that to address Plaintiffs' claims, this Court would necessarily have to find that Judge Bowman erred in ordering the removal of the children. However, Judge Bowman's Order appears to simply indicate that ChildNet was authorized to take action, up to and including removal. The Order did not explicitly order removal outright. Plaintiffs are challenging Defendant Adelusola's Affidavit and Petition for Removal that followed Judge Bowman's Order. This will not involve questioning Judge Bowman's Order.

Furthermore, as noted above, the Supreme Court's decision post-Goodman in Exxon Mobil has limited the circumstances in which the Rooker-Feldman doctrine should be applied. Exxon Mobil, 544 U.S. at 284, 291. The Supreme Court explained that the Rooker-Feldman doctrine is confined to the limited circumstances of "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Id. at 284. In Exxon Mobil, the Court held that the Rooker-Feldman doctrine did not apply as the plaintiff, Exxon Mobil, had prevailed in the state court proceedings and thus "plainly [was not] repair[ing] to federal court to undo the [state court] judgment in its favor." Exxon Mobil, 544 U.S. at 293. Similarly, in the instant case, Plaintiffs were not state-court losers–the judge ultimately determined that there was no probable cause for the removal and ordered the children be returned home. In contrast, in

Goodman, the court ultimately had found probable cause for the removal after finding that the affidavit was credible–thus the claim would necessarily turn on whether the state court had wrongly decided the issue. Goodman, 259 F.3d at 1334. Plaintiffs are clearly not bringing their claims in federal court to undo the state court judgment ordering that the children be returned home. Rather, they seek to raise constitutional challenges to the actions of Defendants that had occurred during the proceedings. Accordingly, the Court finds that the Rooker-Feldman doctrine does not apply and this Court has subject matter jurisdiction over Plaintiffs' claims.

C. Eleventh Amendment

The Eleventh Amendment provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

In addition to the language of the Amendment itself, the Supreme Court has held that an unconsenting state is immune from suits in federal courts brought by her own citizens. Rosario v. Amer. Corrective Counseling Services, Inc., 506 F.3d 1039, 1043 (11th Cir. 2007) (quoting Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993)). Thus, federal courts are precluded from exercising jurisdiction in private suits against states. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). This extends to "private parties seeking to impose a liability [in federal court] which must be paid from public funds in the state treasury . . .." Hufford v. Rodgers, 912 F.2d 1338, 1340 (11th Cir.1990) (quoting Edelman v. Jordan, 415 U.S. 651 (1974)). This immunity does not extend to cities, counties, and other units of government. Rosario, 506 F.3d at 1043. It may, however, extend to arms of the state. Id.

The Eleventh Circuit test to determine whether Eleventh Amendment immunity extends to defendants other than the state turns on four factors: 1) how state law defines the entity; 2) what degree of control the State maintains over the entity; 3) where the entity derives its funds and; 4) who is responsible for judgments against the entity. Shands Teaching Hosp. & Clinics, Inc. v. Beech Street Corp., 908 F.3d 1308, 1311 (11th Cir. 2000) (citing Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1509 (11th Cir. 1990); Tuveson v. Fla. Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 732 (11th Cir. 1984)). The Eleventh Circuit has indicated that the central inquiry is the function or role of the defendant in a particular context–to what extent the defendant is acting as a representative of the State. Shands, 208 F.3d at 1311. In Shands Teaching Hospital & Clinics, Inc. v. Beech Street Corporation, 908 F.3d 1308 (11th Cir. 2000), the plaintiff was a hospital suing third-party claims administrators of the state employee health plan for non-payment. Id. at 1309-10. The Court determined that the administrators were simply "acting at the behest of the State . . . [and a]lthough the contractors made initial benefits decisions, the retention of final decision-making authority as to benefits determinations by [the Florida Department of Management Services] meant that the contractors were agents of [the State]." Rosario, 506 F.3d at 1044 (citing Shands, 208 F.3d at 1312).

As an initial matter, Plaintiffs assert that Defendants, in arguing Eleventh Amendment immunity, have proffered matters outside the pleadings and that discovery is necessary to determine the issue. However, as Eleventh Amendment immunity deprives the Court of jurisdiction, it is viewed as an issue of subject matter jurisdiction, which may be raised at any time. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 n. 8 (1984); see also, Fed. R. Civ. P. 12(h)(3); Shands, 208 F.3d 1308 (Eleventh Circuit upheld dismissal under 12(b)(6) on

grounds of Eleventh Amendment immunity). Therefore, the Court will address it at this time.

1) State law's definition of ChildNet

Florida Statute Section 409.1671(1)(a) declares that "[i]t is the intent of the Legislature that the Department of Children and Family Services shall outsource the provision of foster care and related services statewide." The Statute goes on to state that "'outsource' means to contract with competent, community-based agencies." Fla. Stat. § 409.1671(1)(a). In Rosario v. American Corrective Counseling Services, Inc., 506 F.3d 1039 (11th Cir. 2007), the Eleventh Circuit found that the Defendant was defined as an independent contractor, in both the statute and contract enabling them to run a bad check program. Rosario, 506 F.3d at 1042, 1044. In the instant case, the parties point to the use of the terms "outsource" and "agency" to argue their respective positions.[4]

First, Defendants argue that the intent of the Legislature was to delegate to entities such as ChildNet the tasks that "the state has traditionally provided . . . to children who have been the responsibility of the state." Fla. Stat. § 409.1671(1)(f)(1). They point out that the statute defines ChildNet as a community-based provider that is "the single agency [within Broward County] with which [DCF] shall contract for the provision of child protective services." Fla. Stat. § 409.1671(1)(e). Furthermore, Florida Statute Section 768.28, regarding waiver of sovereign

[4]The Court would further note that though the parties cite to the provision that reads: "outsource the provision of foster care and related services statewide," the language in the statute at the time of the action at issue in this case (the filing of the Affidavit and Petition in February 2004) read: "It is the intent of the Legislature that the Department of Children and Family Services shall *privatize* the provision of foster care and related services statewide." Fla. Stat. § 409.1671(1)(a) (effective July 3, 2003 through June 28, 2004) (emphasis added). It was not until the version effective from July 1, 2005 through June 30, 2006 that the statute used the term "outsource." Plaintiffs, in making their arguments, refer to both the "outsource" and "privatize" language. The Court finds that this does not affect its analysis–in fact, if anything, if further supports the finding that state law does not define ChildNet as an arm of the state. As for the other provisions cited by the parties, the language is the same in the 2004 version and the current statute.

immunity, indicates that state agencies or subdivisions includes corporations primarily acting as instrumentalities or agencies of the states, counties, or municipalities. Fla. Stat. § 768.28. Thus, according to Defendants, ChildNet is a state agency and entitled to Eleventh Amendment immunity.

Moreover, Defendants point out that the state imposed a statutory cap on the economic and non-economic damages plaintiffs can recover in a tort action against ChildNet. Fla. Stat. § 409.1671(1)(h). In order to exceed the cap, claimants would have to bring a claims bill, which is an appropriation of money by the Legislature, pursuant to Florida Statute Section 768.28. Fla. Stat. § 409.1671(1)(i). "The same immunities from liability enjoyed by such providers" is extended to its employees, which would include Defendant Adelusola. Fla. Stat. § 409.1671(1)(i). Defendants argues that this treats its employees as if they were state employees.

Plaintiffs counter that by contracting the services, the state was intending to privatize the functions. Plaintiffs argue that the use of the term "privatize" makes it apparent that the Legislature was not intending for ChildNet to be an arm of the state–the intent was to transfer control from the government to private enterprise. Plaintiffs also point to ChildNet's contract with the State, arguing that it designates ChildNet as an independent contractor, not a state agency. The specific provision Plaintiffs point to is Section I, provision N: "Independent Capacity of the Contractor: 1. To act in the capacity of an independent contractor and not as an officer, employee of the State of Florida, except where the provider is a state agency." Def.'s Exh. F, ChildNet Contract at p. 3. Plaintiffs argue that Florida Statute Section 20.13(11) defines an executive branch state agency as "an official, officer, commission, authority, council, committee, department, division, bureau, board, section, or another unit or entity of government."

Therefore, by definition ChildNet does not qualify as a state agency under state law and they are an independent contractor per the language in the contract.

Plaintiffs also point to the requirement for insurance in the statute. They argue that as the statute requires ChildNet to retain insurance, it must not be considered an arm of the government or sovereign immunity would be applied to ChildNet. This provision indicates that any eligible lead community based provider, "other than an entity to which s. 768.28 applies," must "obtain a minimum of $1 million per claim/$3 million per incident in general liability insurance coverage." Fla. Stat. § 409.1671(1)(h). Furthermore, Plaintiffs argue, the contracts occur with community-based agencies, which infers local, not state, control. As evidence of this, ChildNet is performing the services only in Broward County, therefore, it is not an arm of the state.

As for the division along county lines, the Court finds that this merely reflects an intent to outsource along easily definable boundaries and not that ChildNet is more of a local rather than state entity. For example, in cases involving water management districts, courts in the Southern District have found that the districts were performing state tasks divided along local boundaries–they were "operating under state control to perform a state function with a regional component." Grimshaw v. South Fla. Water Mgmt. Dist., 195 F. Supp. 2d 1358, 1364 (S.D. Fla. 2002); see also, Friends of Environment v. South Fla. Water Mgmt. Dist., 2006 WL 3635465, at *52-54 (S.D. Fla. Dec. 11, 2006) (finding that the Legislature recognized that water resource problems vary from region to region and thus establishing districts on a regional basis). Thus, the Court does not find this argument dispositive as to the issue.

However, the Court does find that ChildNet is not clearly defined as an arm of the state. While ChildNet may carry out traditional state functions, this alone is not sufficient to entitle it to

Eleventh Amendment immunity. Rosario, 506 F.3d at 1047 ("The standard for Eleventh Amendment immunity has never been held to apply simply because an independent contractor performs some government function."). Furthermore, the intent of the Legislature, as clearly stated, was to privatize the services–ChildNet was not deemed a state entity by the statute. As for Defendants' arguments of the use of the term "agency," this appears in context to simply be a generality, similar to the term "entity." This is especially so in light of the contract's reference to independent contractors. Notably, ChildNet has not disputed that insurance is required. Thus, per the terms of the statute, it would not be an entity to which Section 768.28[5] applies–the waiver of sovereign immunity in tort actions. See Fla. Stat. § 409.1671(1)(h). Accordingly, the Court is not persuaded that ChildNet is clearly defined in state law as an agency or arm of the State.

2) Degree of Control over ChildNet

"The second factor-the degree of state control over the [Defendant]-is [also] arguably

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[5]Florida Statute Section 768.28, Waiver of sovereign immunity in tort actions, reads in part:

(1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued. However, any such action against a state university board of trustees shall be brought in the county in which that university's main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence for the transaction of its customary business.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.

mixed, but still weighs against arm of the state status." Abusaid v. Hillsborough County Bd. of County Comm'rs, 405 F.3d 1298, 1306 (11th Cir. 2005). According to Defendants, the ultimate authority for child welfare case management remains in the control of the Department of Children and Family Services, the Florida legislature, and the Florida Governor. The Governor and Legislature retain the right to control the transfer of services to ChildNet. Fla. Stat. § 409.1671(1)(b). In addition, the contract between DCF and ChildNet requires ChildNet to report regularly, to make expenditures in accordance with state guidelines, and holds it accountable to performance standards set by the State. See Fla. Stat. § 409.1671(1)(c)(2); Fla. Stat. § 409.1671(1)(e)(4); see also, Def.'s Exh. F, ChildNet Contract, Attachment I. The State also has control over promulgating written policies and procedures to monitor services, fiscal accountability, and program operations. Fla. Stat. § 409.1671(2)(a).

The control by the State is exhibited in other ways as well, according to Defendants. Florida's Auditor General and Office of Program Policy Analysis and Governmental Accountability retain the right to review and object to the transfer of services to ChildNet. Fla. Stat. § 409.1671(1)(c). The State also controls the training guidelines and minimum hiring and retention standards for ChildNet's employees. Fla. Stat. § 409.1671(1)(e)(6). It was also mandated that state employees in the DCF receive hiring preferences. Fla. Stat. § 409.1671(2)(b). The State also affects the board of directors, in that it mandates that a majority of the board be Florida residents. Fla. Stat. § 409.1671(1)(e)(9). Furthermore, ChildNet is required to include on its written documents either the statement "Sponsored by the State of Florida" or the DCF logo. Fla. Stat. § 409.1671(11).

Plaintiffs argue that the DCF does not maintain any control over the filing of a petition

for removal, the action that is at issue in this case. Plaintiffs contrast the present case with Stoll v. Noel, 694 So. 2d 701 (Fla. 1997), in which a physician consultant was required to abide by the Florida Department of Health and Rehabilitative Services (HRS) Manual. The Florida Supreme Court stated that HRS had itself acknowledged that the manual created an agency relationship between the Children's Medical Services facility and its physician consultants. Stoll, 694 So. 2d at 703. Furthermore, HRS had acknowledged full financial responsibility for the physicians' actions. Id. Thus, the Florida Supreme Court held that the physicians were agents of the state and entitled to sovereign immunity. Id. Here, DCF has contracted the services out to ChildNet. However, the contract with ChildNet only provides that monitoring will occur annually to ensure ChildNet's compliance with the contract. Def.'s Exh. F, ChildNet Contract, Attachment 1, para. A(7)(c). Plaintiffs argue that ChildNet's contract does not exhibit the degree of control necessary to find ChildNet was an agent of the state, thus it is not an arm of the state for purposes of the Eleventh Amendment. In the alternative, Plaintiffs contend that the existence of an agency relationship is an issue for the trier of fact.

In Rosario, the State Attorney's Office retained virtually no control or oversight over Defendant ACCS' activities or performance. Rosario, 506 F.3d at 1045. The issue is much less clear cut in this case. However, the Court finds that, though there are many guidelines for ChildNet to follow, the State did not retain the level of control sufficient for ChildNet to be deemed an arm of the state. Significantly, in Shands, the State retained final decision making authority–which is not the case here. Shands, 208 F.3d at 1312. For example, in the contract with ChildNet the State claimed the right to "inspect and copy any records, papers, documents, facilities, goods and services of the provider which are relevant to this contract . . . to assure the

department of the satisfactory performance of the terms and conditions of this contract." Def.'s Exh. F, ChildNet Contract, I(E), p. 2; see also, Fla. Stat. 409.1671(2)(a) ("the department shall retain responsibility for the quality of contracted services and programs and shall ensure that services are delivered in accordance with applicable federal and state statutes and regulations"). ChildNet has to conform to standards established by the State, but this would appear more akin to regulatory guidelines rather than control exerted over ChildNet by the State.

The controls retained by Florida in this case do not rise to the level of control over daily decision-making, nor specifically over the functions conducted in this case of petitioning for removal of a child. In Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30 (1994), the Supreme Court discounted the arguments that retention of control dictated that Eleventh Amendment immunity be granted. Hess, 513 U.S. at 47. The Court did not find dispositive that New York and New Jersey could appoint and remove commissioners, could veto actions, and determine projects for the Port Authority to undertake. Id. The Court pointed out that "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates," yet not every political subdivision enjoys Eleventh Amendment immunity–as evidenced by the denial of immunity to counties and municipalities. Id. In the instant case, Florida does not even retain such control so as to appoint board members, override decisions, or determine actions to be taken by ChildNet–it prescribes guidelines, a common regulatory action by a state. Thus, as in Hess, the Court does not find this issue dispositive so as to warrant Eleventh Amendment immunity.

3) Funding and Responsibility for Judgment

In Rosario, the Eleventh Circuit stated that the most important factor in determining

immunity is where the ultimate responsibility for judgments against the entity would lay. Rosario, 506 F.3d at 1046. Furthermore, the Supreme Court has stated that the "impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury." Hess, 513 U.S. at 48 (citing Willliam A. Fletcher, A Historical Interpretation of the Eleventh Amendment, 35 Stan. L. Rev. 1033, 1129 (1983)). It is the "vulnerability of the State's purse [that is] the most salient factor in Eleventh Amendment determinations." Hess, 513 U.S. at 48.

The parties do not dispute that ChildNet receives almost all of its funding (99%) from the State of Florida. The parties argue, however, over the consequences of a judgment against ChildNet. Plaintiffs argue that because ChildNet is required to have insurance for tort actions such as this one, the State is not going to have to pay any of the damages. See Fla. Stat. § 409.1671(1)(h). Therefore, the funds that will satisfy the judgment would not come from the State of Florida, but from the insurance company. Defendant counters that as most of their funding comes from the State, it is in essence the State that will have to pay ChildNet's higher insurance premiums if a judgment is granted against them.

Defendants argue that the relevant issue is not whether the state will be paying the judgment from the treasury, but whether state provided funds will be utilized to satisfy a judgment. They cite to Manders v. Lee, in which a Georgia sheriff was deemed an arm of the state. Manders, 338 F.3d 1304 (11th Cir. 2003). The Eleventh Circuit explained that the sheriff would have to pay a judgment from his budget, which included both county and state funds–thus the state's sovereignty and integrity would be affected. Id. at 1324-1329. As ChildNet receives

almost all of its funding from the State, state funds are implicated.[6] Thus, an adverse judgment would interfere with funding and administration. See Shands, 208 F.3d at 1310-11, 1313. Defendants also point to the statutory cap on the economic and non-economic damages plaintiffs can recover in a tort action and that in order to exceed the cap, claimants would have to bring a claims bill, pursuant to Florida Statute Section 768.28. Fla. Stat. § 409.1671(1)(h); Fla. Stat. § 409.1671(1)(i). Since a claims bill is an appropriation of money by the Legislature, any excess judgment would have to be paid by the State.

However, first, in Manders, it was not indicated whether the sheriff was obligated to maintain insurance, as ChildNet is in the present case. The statute specifically mandates that ChildNet must maintain insurance. In Abusaid v. Hillsborough County Board of County Commissioners, 405 F.3d 1298 (11th Cir. 2005), the Eleventh Circuit held that Florida sheriffs are not arms of the state. Abusaid, 405 F.3d at 1306. Not only was the sheriff funded by the county, but the Court found no provision in Florida law providing state funds to satisfy a judgment against the sheriff. Id. at 1312. Notably for purposes of this case, the Court indicated that "[i]n fact, Florida law authorizes sheriffs to purchase liability insurance . . .." Id. The Court rejected the sheriff's arguments that state funds would be implicated indirectly since an adverse judgment would diminish his available resources–thus requiring state law enforcement to fill the gap. Id. at 1312-13 (citing Hess, 513 U.S. 30, 48 for the proposition that the concern is with judgments paid from the State treasury). The Court finds this militates in favor of finding that

[6]Defendants also argue that ChildNet has the discretion to request assistance from the State to satisfy a judgment or settle a claim and cite to Florida Statute § 768.28(3). However, this provision entitles a state agency or subdivision to request this assistance–thus ChildNet is presuming the issue is already resolved by citing to this provision. See Fla. Stat. § 768.28.

Eleventh Amendment immunity does not exist here. As for the State paying any excess judgment, this would still be dependent upon the Legislature approving the claims bill. See Fla. Stat. § 768.28(5) ("that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature"). In this case, the state treasury is implicated only in the sense that ChildNet argues state funds would be used to pay any higher insurance premiums and to the extent that the Legislature would approve a claims bill for a judgment exceeding the cap on damages. The Court does not find this sufficient to establish that ChildNet is an arm of the state.

Moreover, the Supreme Court has indicated that "the question whether a money judgment . . . would be enforceable against the State is of considerable importance to any evaluation of the relationship between the State and the entity or individual being sued." Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 430 (1997) (citing Hess, 513 U.S. at 45-51; Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ford Motor Co. v. Dep't of Treasury of State of Indiana, 323 U.S. 459, 464 (1945)). In Hess, the Supreme Court "focused particular attention on the fact that 'both legally and practically' neither of the relevant States would have been obligated to pay a judgment obtained against the [defendant]." Regents, 519 U.S. at 430 (quoting Hess, 513 U.S. at 51-52). The Court further stated that "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being remains our prime guide." Hess, 513 U.S. at 47. The Amendment was adopted largely to respond to "the States' fears that 'federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin'" and to "emphasize[] the integrity retained by each State in our federal system." Hess, 513 U.S. at 39. Though the present case involves a close question, the Court is guided by the

Supreme Court's instructions to focus on the twin reasons. As discussed above, there is no indication that Florida will be responsible for any judgment against ChildNet and the Court does not find a "genuine threat to the dignity" of Florida in allowing Plaintiffs to pursue this case against ChildNet. Hess, 513 U.S. at 47. Therefore, the Eleventh Amendment does not apply to Defendant ChildNet.

D. Absolute Immunity

Defendant Adelusola argues she enjoys absolute quasi-judicial and absolute quasi-procedural immunity from Counts I and II. In determining immunity, the court uses a functional analysis. Roland v. Phillips, 19 F. 3d 552, 555 (11th Cir. 1994) (citing Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 432 (1993)). Therefore, "the nature of the functions performed [are examined], not the identity of the actor who performed it." Kalina v. Fletcher, 522 U.S. 118, 127 (1997) (citing Forrester v. White, 484 U.S. 219, 229 (1988)); see also, Briscoe v. LaHue, 460 U.S. 325, 342 (1983) ("The immunity analysis rests on functional categories, not on the status of the defendant."). "The proponent of a claim of absolute immunity bears the burden of establishing the justification for such immunity." Antoine, 508 U.S. at 432.

1) Absolute Quasi-Judicial Immunity

In actions brought under section 1983, judges have absolute immunity for all acts done in their judicial capacity. Roland, 19 F. 3d at 555. Absolute quasi-judicial immunity is applied to non-judicial officials because their duties have "an integral relationship with the judicial process" Id. (citing Ashbrook v. Hoffman, 617 F. 2d 474, 476 (7th Cir. 1980)). Absolute quasi-immunity of a non-judicial official is determined by "a functional analysis of the action taken by the official in relation to the judicial process." Roland, 19 F. 3d at 555 (citing Antoine, 508 U.S. at 432).

Thus, an official acting pursuant to a facially valid court order is protected by absolute quasi-judicial immunity. Roland, 19 F. 3d at 556. Non-judicial officials assigned to carry out a judge's order must have absolute immunity to insure such officials do not need permanent legal counsel to perform their functions. Id. "A lesser degree of immunity could impair the judicial process." Id. Thus, a child protective service worker who places a child in a temporary protective shelter acting pursuant to a facially valid court order has been considered a non-judicial official protected by absolute quasi-judicial immunity. Coverdell v. Dep't of Social & Health Servs., 834 F. 2d 758, 762 (9th Cir. 1987); Dolin v. West, 22 F. Supp. 2d 1343, 1349-50 (M.D. Fla. 1998).

2) Absolute Quasi-Prosecutorial Immunity

The main purpose of prosecutorial immunity is to protect the proper functioning of the prosecutor's office, not the office's occupant. Kalina, 522 U.S. at 125. The Eleventh Circuit has not directly addressed the issue of whether child protective workers are entitled to absolute quasi-prosecutorial immunity when performing their functions. The Ninth Circuit has indicated that child protective workers' quasi-prosecutorial functions may arise in connection with initiating and pursuing child dependency proceedings, similar to a prosecutor initiating criminal proceedings. Coverdell, 834 F. 2d at 762.

3) Application to Defendant Adelusola

Defendant Adelusola filed an Affidavit and Petition for Placement in Shelter to the court in support of removal of Brennan and Kaiden from their parents and placement into a shelter. Defendant Adelusola argues she acted pursuant to the dependancy court's order when she

removed the Plaintiffs from their parents' home and thus, she enjoys absolute quasi-judicial immunity because she was an integral part of the judicial system. Alternatively, Defendant contends she is protected by absolute quasi-prosecutorial immunity because this Affidavit was filed in support of a proceeding to determine whether Brennan and Kaiden should be removed from their parents, similar to a prosecutor initiating criminal proceedings.

First, the Court would note that the parties have not even addressed whether Defendant Adelusola would be entitled to immunity traditionally granted to a government official. As discussed above, the Court finds that ChildNet is not an arm of the state–thus whether or not it acted under color of state law and whether or not Defendant Adelusola would be treated similarly to a government official is not clear. However, even assuming that she would be entitled to absolute immunity, the Court finds, for the reasons below, that neither quasi-judicial nor quasi-prosecutorial immunity are applicable in this case.

Defendant argues that she acted similarly to the child protective worker in Coverdell v. Department of Social & Health Services, 834 F. 2d 758 (9th Cir. 1987), and thus should be granted absolute immunity. In that case, the worker was entitled to quasi-judicial immunity for her actions in executing a court order to obtain custody of the child. Coverdell, 834 F.2d at 764-65. As for quasi-prosecutorial immunity, Defendant Adelusola argues that Coverdell should also apply. Defendant Adelusola contends the Court should follow the holding of Coverdell which states that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings." Id. at 763; see also, Swift v. California, 384 F.3d 1184, 1192 (9th Cir. 2004) (a social worker's "decision to institute proceedings to make a child a ward of the state is functionally similar to the

prosecutorial institution of a criminal proceeding" and "is likely entitled to absolute immunity") (citing Miller v. Gammie, 335 F.3d 889, 898 (9th Cir. 2003)).

On the other hand, Plaintiffs counter that Defendant Adelusola acted as a complaining witness by alleging Melissa subjected Brennan to unnecessary medical tests and treatments that were not confirmed by treating physicians. For instance, in the Affidavit, Defendant Adelusola stated that Brennan was taken to the emergency room by Melissa claiming illnesses that were not confirmed by treating physicians. Plaintiffs argue that in fact Brennan was suffering from sinusitis and periodic respiratory illness, and was under the care of a respiratory therapist. Plaintiffs contend Melissa was instructed by the respiratory therapist to take Brennan to the emergency room for treatment of his acute respiratory illness. Plaintiffs claim these alleged false statements, and others, were the basis for the removal of Brennan and Kaiden from the custody of Melissa and Van.

Plaintiffs also point out that Coverdell is a Ninth Circuit case and was decided before the Supreme Court determined that prosecutors do not receive absolute immunity when acting as an investigator or a complaining witness. Plaintiffs encourage the Court to view the case at bar in light of Kalina v. Fletcher, 522 U.S. 118 (1997), where the prosecutor was not entitled to absolute immunity for actions in which she personally attested to the truth of the averments in the certification. Kalina, 522 U.S. at 129. In Kalina, the prosecutor's testimony in the application for an arrest warrant influenced the court to view her as a "complaining witness" and not an advocate. Id. Once the prosecutor gave sworn testimony regarding facts in the application for the arrest warrant, she was no longer entitled to the protection of absolute immunity afforded to a prosecutor because she was acting as a witness, not a lawyer. Id. at 130-31.

As noted above, the Eleventh Circuit has not addressed the issue of whether a child protective worker is entitled to absolute quasi-judicial or absolute quasi-prosecutorial immunity when false statements have allegedly been made by the child protective worker on an affidavit supporting the removal of children from their parents. In Roland, the Eleventh Circuit, citing Coverdell, categorized child protective workers as law enforcement officials that are protected by absolute quasi-judicial immunity when executing a facially valid court order. Roland, 19 F. 3d at 555. Furthermore, the Eleventh Circuit takes a functional approach when determining the absolute quasi-judicial immunity of a non-judicial official. Id. Therefore, prosecutors and non-judicial officials, such as child protective workers, would be entitled to absolute immunity for all actions taken while performing their functions for the court. Id. at 556; Rivera v. Leal, 359 F. 3d 1350, 1353 (11th Cir. 2004) (prosecutor entitled to absolute immunity while functioning as advocate for government).

Accordingly, Defendant Adelusola would be entitled to absolute quasi-judicial immunity to the extent she was acting pursuant to a court order. However, the February 24, 2004 Order had indicated that the Defendant was authorized to take steps, "including, but not limited to removal." Thus, it appears to the Court that Defendant Adelusola was not simply carrying out a court order–she made a determination that removal would be necessary and then prepared the Affidavit and Petition. Had the Order clearly authorized Defendant to remove the children, then there would be a stronger argument for immunity, but the Order discusses restaffing and the authorization to take actions that could include removal. This appears to be allowing Defendant to act on her discretion, but not to simply execute a court order. In contrast, whichever entity, be it DCF or ChildNet, that followed upon on the portion of the Order directing that the State

Attorney's Office be contacted, would clearly be covered by quasi-judicial immunity for executing that clear order. However, as for the removal of the children, on the facts as developed at this time, absolute quasi-judicial immunity may be a factual dispute that remains to be resolved.[7]

As for prosecutorial immunity, both parties have compared child protective workers' functions to those of prosecutors. The Court finds the functions analogous to some extent–such as the initiation of proceedings. However, as indicated in Kalina, immunity does not apply when the prosecutor acts as an investigator or a complaining witness. See also, Rivera v. Leal, 359 F.3d 1350, 1353 (11th Cir. 2004) ("The prosecutorial function, however, specifically does not include functioning as either an investigator . . . or as a complaining witness.") (citing Buckley v. Fitzsimmons, 509 U.S. 259, 275 (1993), Kalina v. Fletcher, 522 U.S. at 129-31). Thus, although the same immunities would apply for certain functions, they similarly should not apply when a child protective worker is acting as an investigator or complaining witness. Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008) (social worker charged in 1983 action with fabricating information in dependency petition, which led to removal, was not entitled to absolute immunity); see also e.g., Swift v. California, 384 F.3d 1184, 1191 (9th Cir. 2004) ("Applying the functional analysis . . . we conclude that [parole officers] are not entitled to absolute immunity for their conduct while . . . investigating parole violations"). In this case, Defendant Adelusola swore to the truth of statements made to the court and therefore, she should not be able to claim absolute immunity for actions taken in the function of an investigator or complaining witness.

[7]The Court notes that at this time quasi-judicial immunity cannot be granted as a matter of law. However, if factually it could be developed that the court's order was actually ordering removal, rather than merely issuing a general statement, then the issue can be revisited at a later stage.

E. Other Issues

1) Qualified Immunity

Defendants argue that if Defendant Adelusola does not receive absolute immunity, then she should receive qualified immunity. "Qualified immunity insulates government officials from personal liability [under § 1983] for actions taken pursuant to their discretionary authority." Waldrop v. Evans, 871 F.2d 1030, 1032 (11th Cir. 1989). To be entitled to immunity, the government official must first demonstrate that he was acting within the scope of his discretionary authority. Saucier v. Katz, 533 U.S. 194, 201 (2001). Upon that showing, the burden then shifts to the plaintiff to demonstrate that 1) the conduct violated a constitutional right and 2) the right was clearly established. Id.; see also, Storck v. City of Coral Springs, 354 F.3d 1307, 1314 (11th Cir. 2003); Evans v. Hightower, 117 F. 3d 1318, 1320 (11th Cir. 1997).

The defendant government official must meet the first step by demonstrating objective circumstances that would lead to the conclusion that his actions were undertaken during the performance of his duties and within his scope of authority. Hutton v. Strickland, 919 F.2d 1531, 1537 (11th Cir. 1990) (quoting Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1998)); Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994). A court's inquiry is two-fold as to this demonstration by the defendant. Holloman ex rel. Holloman v. Harland, 370 F. 3d 1252, 1265-66 (11th Cir. 2004), reh'g denied, 116 F. Appx. 254 (11th Cir. 2004). First, the court must determine whether the government official was performing a legitimate job-related function. Id. Second, the court examines whether the government official was acting according to means that were within his

power. Id.

Defendants argue that Ms. Adelusola was performing her duties as a caseworker and thus, clearly within the scope of her authority. Lenz v. Winburn, 51 F.3d 1540, 1544 (11th Cir. 1995) (social worker entitled to qualified immunity while acting to take child into protective custody). They argue that the Order directed her to take actions necessary to protect the interests of the child. Defendants argue that the Complaint does not establish, and Plaintiffs cannot prove, that a reasonable caseworker standing in Defendant Adelusola's shoes should have known that, based on the facts available, the conduct was unlawful in light of the clearly established law. She was acting upon the order of a circuit court judge during a judicial proceeding. The Order read in part: "The Dept shall restaff this case and is hereby authorized to take such action to protect the minor children, including, but not limited to removal." Exhibit D, Def. Motion to Dismiss. Thus, they were entitled to rely on the plain meaning of the language in the Order–that they were authorized to take actions to protect the children, which included removal.[8]

Plaintiffs counter that the Order was simply an order to restaff the case and was not an order for removal. Plaintiffs argue that it is clearly established that an official "may not remove a child from parental custody without judicial authorization unless there is probable cause to believe the child is threatened with imminent harm." Doe v. Kearney, 329 F.3d 1286, 1295 (11th Cir. 2003).[9] In addition, it is also clearly established that "offering false testimony in reckless

[8]Other than Defendants' referencing that the Order contains handwritten language, neither party really addresses the significance of the handwritten portion of the Order directing the Department to contact the State Attorney's office and relay the information. It remains to be developed whether Defendant Adelusola is entitled to qualified immunity for reasonably relying on the state of the law at the time of these actions.

[9]There is no allegation that Judge Bowman made any determinations as to probable cause of the children being threatened prior to entering the February 24, 2004 Order. Thus, the issue would seem to turn on whether

disregard for the truth" violates the Constitution. Kelly v. Curtis, 21 F.3d 1544, 1554 (11th Cir. 1994).

At this stage in the litigation, the factual issues as to whether Defendant was acting within the scope of her employment are unclear and must be resolved at a later stage. Though the Court recognizes that the issue of qualified immunity must be determined at the earliest possible stage, as it provides not just immunity from liability, but immunity from suit, Robinson v. Arrugueta, 415 F. 3d 1252, 1257 n.5 (11th Cir. 2005), cert. denied, 126 S. Ct. 1063 (2006), some factual matters are best left for resolution at a later stage. See e.g., Riley v. Wainwright, 810 F.2d 1006, 1007 (11th Cir. 1986) (indicating that a denial of motion for summary judgment was not an appealable final decision as the qualified immunity claim was denied, not on an issue of law, but due to the need for "substantial factual development"); Kerfoot v. Breeden, 2007 WL 988661, *5 (M.D. Ga. March 29, 2007) ("Respecting the instant Motion to Dismiss, it is found, not that Defendant has failed to assert the defense of qualified immunity, but rather, that in light of the facts presented, that he has failed to do so in such a fashion that mandates dismissal of this action."). As discussed throughout this Order, the numerous factual matters that remain to be developed prevent the granting of the Motion to Dismiss.

Furthermore, the Court would note that the parties did not brief the issue of whether Defendant Adelusola would even be considered an individual traditionally entitled to qualified immunity. See e.g., Richardson v. McKnight, 521 U.S. 399 (1997) (prison guard employed by private, for profit corporation not entitled to qualified immunity); Jensen v. Lane County, 222

Defendant Adelusola had probable cause to believe there was threatened harm.

F.3d 570 (9th Cir. 2000) (physician under contract to provide services for county correctional facilities was not entitled to qualified immunity); Bartell v. Lohiser, 215 F.3d 550 (6th Cir. 2000) (private foster care contractor and its social workers entitled to assert qualified immunity defense); Hinson v. Edmond, 192 F.3d 1342 (11th Cir. 1999), amended by, Hinson v. Edmond, 205 F.3d 1264 (11th Cir. 2000) (qualified immunity not extended to physician employed by private for profit company contracting with county to provide medical services to prison). The factual issues, along with the issue of whether Defendant Adelusola is entitled to qualified immunity can be resolved at a later stage of the litigation.

2) Failure to State a Cause of Action

Defendants move to dismiss Counts I and II-the Section 1983 claims against Defendant Adelusola-for failure to state a cause of action. They argue that Plaintiffs have not identified the clearly established right that was allegedly violated. GJR Investments v. County of Escambia, 132 F.3d 1359, 1366-67 (11th Cir. 1998). Thus, it cannot even be determined whether there was a right that was clearly established. They argue that the Complaint only alleges that a familial relationship was interfered with and that their rights under the Fourth and Fourteenth Amendments were violated. These are merely conclusory allegations and should be dismissed.

Plaintiffs counter that there is no heightened pleading standard under 1983. Swierkiewicz v. Sorema N.A., 122 S.Ct. 992 (2002). They argue that though the Eleventh Circuit has never considered or cited Swierkiewicz in the context of an individual liability claim under 42 U.S.C. 1983, it is clearly established that such a standard is not permissible.

When a § 1983 action is brought against an individual government official asserting

qualified immunity, there is a heightened pleading standard. GJR Investments, 132 F.3d at 1285-86 ("[a]lthough the Supreme Court has held that courts may not impose heightened pleading requirement in § 1983 cases involving municipalities, ... we likewise declined to extend its holding to cases involving individual government officials, ... and we likewise decline to do so here."); see e.g., Washington v. Bauer, 149 Fed. Appx. 867, 870 (11th Cir. 2005) ("there is a heightened pleading requirement when a plaintiff brings § 1983 complaint against officials acting in their individual capacities"); Dalrymple v. Reno, 334 F.3d 991, 996 (11th Cir.2003) ("we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity"); Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003); Laurie v. Alabama Court of Criminal Appeals, 256 F.3d 1266, 1276 (11th Cir.2001) (acknowledging that "[h]eightened pleading is the law of this circuit"). However, both the Eleventh Circuit and the Supreme Court have specifically rejected the argument that a heightened pleading requirement applies to § 1983 actions against entities not entitled to raise qualified immunity as a defense. See e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Swann v. Southern Health Partners, Inc., 388 F.3d 834, 837 (11th Cir. 2004) ("Leatherman made clear that any heightened pleading requirements in § 1983 actions against entities that cannot raise qualified immunity as a defense are improper."). As it is not clear at this stage whether or not qualified immunity is applicable in this case, it equally is not established yet that there would be a heightened pleading standard. Thus, the Court finds that Plaintiffs have sufficiently stated their claims to survive at this stage of the litigation.

In addition, the Court would note that the parties have not addressed whether state action

has even occurred based on the facts alleged in the Complaint. As discussed above, the Court finds that ChildNet is not an arm of the state–it also remains to be determined whether it would be considered to have acted under color of state law for purposes of the Section 1983 claims. See e.g., West v. Atkins, 487 U.S. 42 (1988) (physician under contract with state to provide medical care for prison acted under color of state law); Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) (corporate creditor acted under color of state law in attaching property before judgment; Blum v. Yaretsky, 457 U.S. 991 (1982) (nursing home providers providing services to Medicaid recipients did not act under color of state law); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (nonprofit private school did not act under color of state law despite receipt of public funds) Jensen v. Lane County, 222 F.3d 570 (9th Cir. 2000) (physician under contract to provide services for county correctional facilities acted under color of state law). As the parties have not briefed the issue, the Court will not address it at this time.

III. CONCLUSION

For the aforementioned reasons, it is hereby **ORDERED AND ADJUDGED** that Defendants' Motion to Dismiss [DE-10] is **DENIED**.[10] Defendants shall file an Answer within 10 days from the date of this Order.

[10]Plaintiffs had requested that if the Court dismisses the case, that it decline to exercise supplemental jurisdiction over the state law claims. However, as the Court is not dismissing the case, it need not address those arguments.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 26th day of September, 2008.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:
Hugh L. Koerner, Esq.
Luis E. Ordonez, Esq.
Charles J. Zimmerer, Esq.